VICTOR POWERS and FLORENCE SELLERS

IBLA 70-40 Decided March 20, 1972

Appeal from decision (Wyoming W-4-69-6 (15)), as amended, by Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, affirming decision of the District Manager awarding a grazing lease to Marion and Arthur M. Larson and rejecting the application of Victor Powers to renew his lease for the same land.

Reversed.

Grazing Leases: Awards of Grazing Leases: Conflicting Applications

In keeping with the purposes of the Taylor Grazing Act, as shown in its title, the award of lands to an applicant for a grazing lease under section 15 of the Act and the rejection of a conflicting application for a renewal grazing lease for the same land will be reversed where the record shows that both applicants have equal preference rights to lease, similar needs for the land, and proper management of the leased range land will be obtained from either applicant.

APPEARANCES: Harry L. Harris for Victor Powers and Florence Sellers.

OPINION BY MRS. LEWIS

This is an appeal by Victor Powers and Florence Sellers from a decision dated February 24, 1969, amended April 2, 1969, whereby the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, affirmed the decision of the District Manager, who awarded a grazing lease for Sec. 28, T. 14 N., R. 117 W., 6th P.M., Wyoming, to Marian and Arthur Larson. The District Manager's decision also provided that (1) the proposed lease to the Larsons would include a stipulation for implementing a management and development plan; and (2) Victor Powers would be issued a crossing permit to permit him access to and from the privately leased lands.

In the instant appeal appellants contend: the decision of the Office of Appeals and Hearings is not in conformity with law and

applicable regulations; the findings of fact in issue are not supported by substantial evidence; the decision of the Director, Bureau of Land Management, is arbitrary, capricious, and characterized by abuse of discretion; the appellants were deprived of due process of law; and the district manager acted without or in excess of his powers.

The record shows that on July 18, 1966, Victor Powers filed a renewal application for a grazing lease on Section 28, and on July 11, 1966, Marion and Arthur Larson filed a new application for the same land. Powers by a private lease with Mrs. Allen Sellers and Allen Sellers, Jr., controls Section 32, T. 14 N., R. 117 W., 6th P.M., and Section 5, T. 13 N., R. 117 W., 6th P.M. Section 32 corners the land in conflict. By private lease with Mrs. Anna H. Holt, the Larsons control Sections 21, 29, and 33, T. 14 N., R. 117 W., 6th P.M., which adjoins the land in conflict.

The theory of the district manager in awarding the lease to the Larsons is: He found that both applicants had a preference right to a lease and that the decision must be made on the basis of the existing ranch operations, actual needs of the parties, and proper range management. He then concluded the applicants had approximately equal need and awarded the lease on the basis of range management considerations. He found: The practice by Powers of exchanging Section 28 to be used by Larson for the use of Section 33 by Powers is tantamount to sub-leasing, which is a violation of the lease, and cannot be considered a factor in support of Powers' application; the location of livestock water and the land pattern are the controlling factors affecting proper range management in this case; and, based on the latter, the Larsons can provide the better range management.

According to the district manager, the land pattern favors Section 28 being used as a single range unit along with the Larsons' Sections 21, 29, and 33. The location of water for this range is on Section 32, the northwest corner of Section 33, the southwest corner of Section 28, and the east side of Section 29. Further, according to his decision, there is a small reservoir in Section 21 which

> . . . can be developed to provide a non-permanent water supply and in conjunction with a possible water development on the east side of Section 28, provide an aid to obtain more uniform use of Section 28 and reduce the heavy over grazing of the west and particularly the southwest parts of Section 28. The existing water plus the additional water development as discussed above will permit uniform use and proper management of both the public land and the adjoining private lands.

In their appeal the appellants agree that the range conditions on the west side of the lease lands are poor. They cite two reasons:

> First, the leased lands are not suitable for summer range because of weather and feed conditions. The District Manager has found that the Larson's [sic] propose to use Section 28 for summer range during July, August and September. Second, the only water on Section 28 is provided by beaver ponds on Moss Creek in the extreme southwest corner of said section. There is no live water on Section 21 and no possibility or potential of developing live water on this section. Due to this poor distribution of water, Larson's use of Section 21 results in extremely heavy use of Section 28 when their sheep grazing in Section 21 are required to traverse Section 28 in order that they may have access to the water. Powers' control and use of Section 32 eliminates the necessity of this heavy use due to geographical location of said sections and allows for better range management. The District Manager has further found that Powers intends to use and has in fact used the leased lands for early summer and early fall range. The lands in conflict are much more suitable for this type of seasonal use which again is compatible with better range management than that which results from Larson's summer use.
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> 2. The Director, in his decision (page 2) finds that Mr. Powers objections relative to developing a permanent water source on Section 21 is overcome by the inclusion of stipulations in the proposed lease to Larson's [sic] that they develop a permanent water source. This completely ignores the fact that there is no live water on Section 21 to develop. The small reservoir now located in Section 21 is dependent almost entirely upon natural run-off from snow pack and storage and this factor prevents any possibility of development of a permanent water source. If the Director's decision to offer Larson's [sic] a lease on Section 28 is not reversed the west side of this section will be subject to the continued over-grazing as found to exist by the District Manager. As above indicated, Mr. Powers' control of Section 32 eliminates the necessity of over-grazing and affords better range management and would be for the best interests of the public.

The record shows that when the district manager's office scheduled a meeting to discuss the conflicting applications for Section 28, although notified, the Larsons did not attend but both the appellants and their attorney were present. The report to the district manager filed by Francis E. Noll, range and wildlife specialist with BLM, who attended the meeting, states that Mrs. Sellers at that meeting objected to the Larsons being given preference for the lease when their son worked for BLM.

Mr. Noll in his report detailed the nature of the involved lands, which he personally examined. He found the overall range condition of Section 28 fair and the west side of it in poor condition. He stated the only water on the section was on the southwest corner and was provided by beaver ponds. The appellants in their appeal assert that there is no live water on Section 21 and no possibility of developing live water, and that the small reservoir now located on Section 21 is dependent almost entirely upon natural run-off from snow pack and storage. No response to the appeal was filed by the Larsons. Consequently, the assertion stands as uncontradicted.

The district manager's conclusion that the Larsons are able to provide better range management depends largely on a future development of the supply of livestock water. This future plan envisions that the reservoir on Section 21 can be developed to provide a more permanent water supply and that there will be "a possible water development" on the east side of section 28. In sum, the supply of livestock water on which the district manager relies depends on future development which may not be possible.

Moreover, in their appeal, the appellants assert as follows:

> . . . If the Director's decision to offer Larson's [sic] a lease on Section 28 is not reversed the west side of this section will be subject to the continued over-grazing as found to exist by the District Manager. As above indicated, Mr. Powers' control of Section 32 eliminates the necessity of over-grazing and affords better range management and would be for the best interests of the public.

Again, this assertion stands in the record, uncontradicted by the appellees.

We note that Powers or his predecessor, Mr. Allen W. Sellers, have held successive leases on Section 28 for 34 1/2 years.

In all the circumstances, the fact that the appellants have held the lease to Section 28 for almost 35 years, that their preference and need is substantially equal to that of the Larsons, and that any better range management by the Larsons depends upon the uncertain possibility of future development of a water supply, in consideration of all the surrounding circumstances, we see no convincing reason to take the grazing use of the land from the appellants and to award it to the Larsons. The stated purposes of the Taylor Grazing Act, 48 Stat. 1269, as manifested in its title ". . . to provide for . . . orderly use, improvement, and development . . . [and] to stabilize the livestock industry dependent upon the public range . . ," are not enhanced by the disturbance of an existing ranch operation, which disturbance would be predicated upon sheer conjecture. Accordingly, we award the lease to Section 28 to the appellant Powers, hereby reverse the decision below, and remand the case for action consistent herewith. See Camp Creek Cattlemen's Association et al., A-30418 (October 28, 1965).

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed and remanded.

Anne Poindexter Lewis, Member

We concur:

Frederick Fishman, Member

Douglas E. Henriques, Member